IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 6

AARON HENRY ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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PROCEEDINGS AND OPINIONS BELOW.

For the information of the court, Mississippi has the dual system of equity and law courts, criminal cases being tried in the latter. The circuit court is the law court of general jurisdiction for all crimes and has concurrent jurisdiction in misdemeanor cases with justice of the peace courts and county courts. Those counties in Mississippi which meet certain standards may have county courts and Bolivar County, in which this case originated, is one of those counties. Upon conviction for a misdemeanor in a justice of the peace court, the appeal is to the county court, if there is one, where there is a trial de novo, the circuit court of that particular district being the court of last resort except when a constitutional question is involved, in which case further

appeal may be had to the Supreme Court of Mississippi, the highest court. In the case at bar petitioner was originally convicted in a justice of the peace court in which an original affidavit had been made against him and on the basis of which a warrant had been issued and he had been arrested. At the trial in justice of the peace court, the affidavit was amended under the statutes and rules applicable in Mississippi procedure. See trial transcript and opinion of the Mississippi Supreme Court, *Henry vs. State*, 154 *So. 2d* 289. On appeal to county court, he was again convicted by a jury. That conviction was reviewed by the Circuit Court of Bolivar County and affirmed and the case then appealed to the Supreme Court of Mississippi.

The conviction was reversed by the Supreme Court of Mississippi, that opinion reported in 154 So. 2d 289. When the opinion of the Mississippi Court was read and studied by this pleader, a suggestion of error was prepared and filed in the Mississippi Court, a copy of which is appendicised hereto.

At this point some explanation of the workings of the Mississippi Supreme Court is in order. There are nine Supreme Court Judges. They seldom sit en banc. They sit every Monday during their terms in panels of five judges with the Chief Justice and a Presiding Justice alternating and the remaining seven judges sitting in rotation under them. Therefore, most cases are heard by only five judges, with the result that unless there is a difference of opinion among those five, it is possible for an opinion such as the original opinion in this case to be handed down without the knowledge or understanding of the other four judges. Of the five judges who hear a case, the case is assigned to one of them and a second judge studies the record and briefs

and "checks" the judge responsible for the case in his reporting of the case in conference. Thus, it is possible for a decision to be handed down by a panel of judges without all of them fully understanding the case.

When the writer filed the suggestion of error herein a copy was furnished to all nine judges, the matter was taken up en banc by the court and the result was that all nine judges of the court agreed unanimously that the suggestion of error was well taken and should be sustained. It is, perhaps, a reflection upon the writer that the case was not thoroughly briefed before the Mississippi Court upon its original presentation but, nevertheless, the principles involved were so seemingly well established that it was inconceivable to this writer that the Mississippi Court would reverse the case for the reason that it did. It is to the credit of the Mississippi Supreme Court that its original opinion was withdrawn when the error thereof was pointed out.

In the event that there is any confusion in the mind of this court as to the reporting of the second opinion of the Mississippi Supreme Court, the original opinion came out in the Southern Reporter Advance Sheet at 154 So. 2d 289 shortly after the filing of the suggestion of error but after the type had already been set for the printing of the Advance Sheet and the opinion was reported in the Advance Sheet even though West Publishing Company was by telephone advised by the Clerk of the Mississippi Court that the opinion had been withdrawn. For reasons of their own, West Publishing Company reported the opinion sustaining the suggestion of error in the same 154 So. 2d at page 289 when the bound volume of that edition was printed. Therefore, the original opinion will not be found in the bound volume.

As appendices hereto and made a part hereof are the following instruments:

Appendix 1—Appellant's assignment of errors in the Mississippi Supreme Court

Appendix 2—Brief for Appellant

Appendix 3—Brief of Appellee, State of Mississippi

Appendix 4—Suggestion of Error and Brief in Support thereof by State of Mississippi

Appendix 5—Appellant's reply to State's suggestion of error

Appendix 6—Mississippi's reply to Appellant's answer to suggestion of error

Appendix 7—Letter from Hoke Stone to Garland Lyle (sic.)

THE EVIDENCE.

Admittedly, the evidence obtained as a result of what the Mississippi Supreme Court determined was an unlawful search of petitioner's car had strong probative value and was strongly corroborative of the testimony of the prosecuting witness Eilert. Nevertheless, this was not the only evidence as is maintained by petitioner and the Court is referred to the suggestion of error filed in the Mississippi Supreme Court and the second opinion of the Mississippi Court. As was pointed out in the suggestion of error, corroboration of the witness Eilert was not necessary and his testimony alone would have been sufficient to convict. Corroboration is not necessary, *Holt vs. State* (*Miss.*), 191 *So.* 673. The Mississippi Supreme Court undoubtedly agreed with the suggestion of error on this point since its earlier state-

ment on the subject was not reiterated in its second opinion.

So far as is known to this writer, every court in the Union, including the Federal Courts, requires that at some point an objection for motion to suppress be made with respect to evidence unlawfully obtained. This writer has found no case from this court to the contrary, so long as judicial integrity had been maintained in the trial court. If a state court procedure affords a means of excluding incompetent evidence, so long as it is relevant and material, it will be received in the absence of any objection for a timely objection, if the state court procedure so affords. Thus, the statement in the second paragraph of page 12 of the petition herein is definitely erroneous in that the matter is one of procedure. This matter was gone into thoroughly in the suggestion of error filed in the Mississippi Court and in the second opinion of that court. Mississippi has for many, many years adhered with a vengeance to the exclusionary rule of evidence, and, consequently, *Mapp vs. Ohio*, 367 *U. S.* 643 (1961) had no real effect upon Mississippi prosecution. However, Mapp recognized that (Headnote 9), "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." Courts considering this proposition have continuously held that such objection or motion must be seasonably made in order to raise the question on appeal. E. g. *People vs. King*, 26 *Ill. App. 2d* 586, 188 *N. E. 2d* 11, (1963). Cf. also *On Lee vs. United States*, 343 *U. S.* 747.

Shorey vs. Maryland, 177 *Atl. 2d* 245; *cert. den.* 371 *U. S.* 928, (1962) is singularly like the case at bar and in which it was said:

"But the complete answer is that there was no objection in the trial court on the ground of illegal arrest. *Young vs. State*, 220 *Md.* 95, 99, 151 *Atl. 2d* 140, *cert. den.* 363 *U. S.* 853, 80 *Sp. Ct.* 1634, 4 *L. Ed. 2d* 1735. Nor was there any objection to the introduction in evidence of the articles of clothing, *Young vs. State, supra; Madison vs. State*, 200 *Md.* 1, 8, 87 *Atl. 2d* 593; *Lenoir vs. State*, 197 *Md.* 495, 506, 80 *Atl. 2d* 3. The majority opinion in the Mapp case seems to recognize (367 U. S. pg. 569, 81 Sp. Ct. pg 1684, Note 9) that state procedural requirements to raise or preserve the question may still be respected, even where it is claimed that the Fourteenth Amendment is violated by the introduction of illegally obtained evidence in a state prosecution."

This writer is of that school that believes appellate courts should review cases on the record before it. However, it is the practice with many lawyers to depart the record and attempt to influence the court with matters not found therein. It is significant that in the suggestion of error filed in the Mississippi Supreme Court, with reluctance, it was stated by the writer that when the district attorney who prosecuted this case originally was advised by telephone of the ground for reversal in the original opinion of the Mississippi Supreme Court, he was shocked and stated to the writer that, contrary to the assumption originally of the Mississippi Supreme Court with respect to the lack of knowledge of out-of-state counsel with respect to the necessity of objection to evidence, one of such counsel rose as if to object and was either pulled down or motioned down by his colleague. It is extremely significant that this statement of fact outside the record was neither challenged in the Mississippi Supreme Court nor in the petition for certiorari before this court. It must, there-

fore, be assumed that the failure to object was a deliberate stratagem. This is further exemplified by the fact, as reflected by the record before this court, that petitioner's counsel at the trial, and who are his counsel here, not only deliberately withheld objection to the evidence complained of, but introduced even more evidence on the same subject in putting on petitioner's defense. The element of estoppel argued in Mississippi's original brief before the Mississippi Court and in the suggestion of error has not been given even a token answer in the petition before this court.

THE JURISDICTION OF THE TRIAL COURT.

It is argued by petitioner that none of the courts trying him had jurisdiction because there was no affidavit upon which he could be tried. The trial transcript reflects conclusively that there was an original affidavit lodged with the justice of the peace at the time the arrest warrant was issued and petitioner's attorney admitted into the record that an amended affidavit was properly substituted for the original one which was lodged with the justice of the peace. Arguments of petitioner on this score are fully answered by the trial transcript and by the opinion of the Mississippi Supreme Court, both the original and substituted opinion.

THE POLICY OF MISSISSIPPI.

Petitioner would have this court believe that this prosecution was one of many cases in the state and Federal courts in Mississippi brought as a result of a conspiracy upon the part of the citizens of Mississippi to persecute anyone engaged in so-called civil rights activities. Quite the contrary has been observed by this writer. Regrettable it is that so much strife and controversy have been forced upon the people of Mississippi.

It is just such things as this that have brought and are still bringing about the destruction of one of the healthiest racial situations in the world. Until recently there was a growing spirit of mutual respect and confidence between the races in Mississippi which was bringing about a wholesome betterment of the social and economic conditions. Now, rather than a conspiracy to persecute the Negro race or anyone engaging in activities on the surface in their behalf, quite the contrary is true and it seems that such people think they are above the law, that they can commit any sort of act and, upon apprehension and prosecution, scream "police brutality" and "persecution".

It would be impractical to discuss each of the cases and instances set out in the petition. However, this writer has some personal knowledge of the following alleged acts of persecution. The petition refers to the bombing of petitioner's home in March of 1963 and would leave this court with the inference that the guilty parties were released with nothing more than a slap on the wrist. The full and complete explanation of what happened and the reason therefor is contained in the letter (Appendix 7) from the district attorney to this writer.

After the bombing petitioner stated that he hired a watchman to guard his residence, that he had requested and acquired a permit for the possession of a revolver, but was later arrested for the possession of a concealed weapon. If he obtained a permit, it would be interesting to know from whom, since no such permit is authorized by Mississippi law.

It is alleged that James Meredith was charged with misrepresenting his residence in registering to vote simply on account of the fact that he had applied for

admission to the University of Mississippi. As a fact, James Meredith was so charged and in his application for registration he did as a fact misrepresent his residence and would have been prosecuted as anyone else had not the Fifth Circuit Court of Appeals enjoined the State of Mississippi.

It is alleged that a prior applicant to the University of Mississippi had been charged with reckless driving and possession of alcoholic beverages and another committed to a state mental institution.

The first of these instances involved one Clyde Kennard. He sought admission to the University of Southern Mississippi and it is a fact that he was arrested that same day for reckless driving and a quantity of illegal whiskey was found in his car. He was tried and convicted in justice of the peace court, from which an appeal was taken to the County Court of Forrest County, Mississippi. He did not appear at the return term and a writ of procedendo was issued in each case. Later, the judgment of the county court was set aside on the ground that he had satisfactorily explained his failure to appeal and he was never retried. Subsequently a patrolman in the City of Hattiesburg, Mississippi was making his rounds when he saw a burglar flee in a car from a co-operative feed store with a quantity of 100 pound sacks of chicken feed. The tag number of the car led this officer the same night to the home of a young Negro in Hattiesburg. Upon interrogation, this young Negro, who was an employee of the feed store, implicated Clyde Kennard and stated to the officer and later in court that he was stealing the feed for Kennard, who then operated a small chicken farm outside of Hattiesburg. Manufacturers tags and serial numbers thereon which matched those stolen from the feed store

were found at Kennard's farm where the officers went with a search warrant. Kennard was convicted of burglary and sentenced to the State Penitentiary. After being there a short while he became ill, his condition was diagnosed as cancer and, Governor Barnett having been advised of such by this writer, he was given an indefinite suspension of sentence and released. He died some time later.

The other instance involving commission to a mental institution involved one Clennon King. The Reverend Clennon King was pastor of a church and a professor at Alcorn College. Prior to his attempt to register at the University of Mississippi he had so conducted himself at this college and at this church that the student body put on a boycott and the church dismissed him. His salary at this college was paid by the State of Mississippi for an entire year, even though no students would attend his classes and he was performing no services at this institution. He later wrote for material to apply for admission to the University of Mississippi and was furnished same by the University authorities. When he appeared at the registration office at the University his application was not complete but he insisted on being registered anyway. He refused to line up with other student applicants and insisted on being attended to with priority. University authorities attempted to reason with him in a room in the Lyceum Building at the University but his conduct became violent, he went berserk and it became necessary for two officers to carry him out of the building. His conduct was such as to lead any observer to believe that he was mentally unbalanced and after a committal heard in the proper court, he was ordered committed to the Mississippi State Hospital for observation and diagnosis. He was dis-

missed two weeks later after a finding that he was without psychosis. Subsequent conduct of the Reverend King would indicate to any member of this court familiar with it that King is certainly unbalanced and irrational even if without psychosis. Since his departure from Mississippi he has continued to seek publicity and has created trouble in California, Florida, Vermont, Mexico and, perhaps, other places unknown to this writer. He was arrested in California for jay-walking and in that instance screamed persecution. He had someone drive his family from Mississippi at one time. The driver was arrested by a highway patrolman in Florida for speeding and he attempted to justify his conduct by saying that he was speeding Reverend King's family out of Mississippi to save their lives. Later his wife filed criminal charges for abandonment of the children but they were subsequently reunited and went west. He took his family into Mexico and sought political asylum, creating trouble with the Mexican authorities and the U. S. Ambassador. He has advocated a Back to Africa movement and at one time advocated dividing the United States into two nations, one black and one white. In 1960 he announced that he was running for President and that Richard Nixon would be a good running mate for Vice-President. He sought to qualify for this race in Vermont, Louisiana, Georgia and Florida and perhaps other states. When his last child was born in Los Angeles, he named it "California — Is — America's Police-State — Knows Tanimola — Ayorinde." I rest my case on the good faith of those who had Clennon King committed for examination.

It is also suggested that a white attorney was arrested on a trumped up morals charge concerning a male minor because such attorney had been participating in civil

rights activities. This could only refer to one William L. Higgs, who was subsequently convicted and has been disbarred. He did not even appear to defend himself and he was tried in absentia on the misdemeanor charge of contributing to the delinquency of a minor by acts of sodomy. Three capable lawyers were appointed to defend him and did so. While a copy of the trial transcript was obtained by Higgs or someone in his behalf, no appeal was taken and he has not since returned to the State of Mississippi. The facts known to this writer and reflected by the open court records are that one William McKinley Dawalt, age 16, of Route 2, Lewis Road, Collegeville, Pennsylvania, had a wreck late one night in the City of Jackson. When the investigating officers appeared and found this young boy without a drivers license and operating a car which he said belonged to Higgs, Higgs was advised and appeared to claim the car. Because of the age of the boy and his uncertain story as to his being in Jackson, the next morning he was taken into Juvenile Court, a branch of the County Court of Hinds County, Mississippi, where he related all of the acts with which Higgs was later that day charged. The boy had been staying at the local Y. M. C. A. which was also frequented by Higgs and Higgs had invited the boy to come stay with him at his house in which Higgs lived by himself, having been divorced by his wife on account of his proclivities. The boy had been with Higgs for two or three days prior to the car wreck and related numerous instances that took place at the Higgs' house involving sexual perversion. The son of Governor Brown of California was also staying with Higgs and it is the information of this writer that Governor Brown was advised and young Brown quickly departed. Higgs could have been charged with a felony but, rather than keep the young

boy available as a witness before the grand jury, which would not meet for several weeks, Higgs was merely charged with the misdemeanor.

In another instance petitioner refers to a case in the United States District Court for the Southern District of Mississippi wherein one of the attorneys for petitioner, R. Jess Brown, was cited for contempt after one party plaintiff had denied having authorized him to act for her. A bill of complaint was filed seeking desegregation of public schools and this party filed a motion to have her name withdrawn as a party plaintiff and stated therein that Brown had no authority to act for her. When a hearing was had on the citation, which lasted for three days, Brown could have absolved himself immediately by furnishing the court with a document he had in his possession which the United States District Judge, when it was presented to him, concluded might have been sufficient for Brown to have thought he was authorized to use the party's name in the complaint. Since Brown did not furnish this to the court until a considerable cost bill had accrued, he was taxed with the costs of the proceedings. In this instance petitioner is charging a United States District Judge with being a part of a conspiracy to oppress Negroes. While R. Jess Brown appears of counsel for petitioner before this court, he advised this writer that he had no part in the preparation of the petition, had not even seen a copy of it and that he positively did not subscribe to the inference which would be drawn from the allegations of the petition.

It is regrettable that the writer is forced to depart the record as petitioner has done and make the narrative statements of fact above. However, these charges could not go unanswered to the extent that they could be

answered within the knowledge of this writer and it is respectfully submitted that this court should not be influenced by the despicable allegations, untrue in most cases and at best only half true.

CONCLUSION

It is respectfully submitted that the authorities cited hereinabove and in the appendices hereto will convince this court that certiorari should be denied.

Respectfully submitted,

JOE T. PATTERSON, Attorney General
By G. Garland Lyell, Jr.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have mailed a copy of the foregoing Answer to Petition for Writ of Certiorari to the Supreme Court of Mississippi to counsel of record as follows:

Robert L. Carter
Barbara A. Morris
20 West 40th Street
New York 18, New York

Jawn A. Sandifer
271 West 125th Street
New York 27, New York

Jack H. Young
115½ N. Farish St.
Jackson, Mississippi

R. Jess Brown
125½ N. Farish St.
Jackson, Mississippi

by U. S. Mail, postage prepaid, by depositing same in the United States Mail Box in the New Capitol Building in the City of Jackson, Mississippi.

This the 13th day of January, A. D., 1964.

ASSISTANT ATTORNEY GENERAL

APPENDIX 1

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL FROM THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

No. 42652

AARON HENRY ..... Appellant

v.

STATE OF MISSISSIPPI ..... Appellee

ASSIGNMENT OF ERROR

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL FROM THE CIRCUIT COURT OF BOLIVAR COUNTY, MISSISSIPPI SECOND JUDICIAL DISTRICT

No. 42652

AARON HENRY ..... Appellant

v.

STATE OF MISSISSIPPI ..... Appellee

ASSIGNMENT OF ERROR

I

The Court below erred in denying defendant's pretrial motions for issuance of subpoenas duces tecum.

II

The Court below erred in denying defendant's motion for dismissal of the case.

III

The Court below erred in denying defendant's motion for a directed verdict at the close of the State's case.

IV

The Court below erred in overruling defendant's motion for a new trial.

Respectfully submitted,

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APPENDIX 2

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

1963

No. 42652

AARON HENRY ..... Appellant

v.

STATE OF MISSISSIPPI ..... Appellee

BRIEF FOR APPELLANT
ON APPEAL FROM THE CIRCUIT COURT
OF BOLIVAR COUNTY, MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal from an order of the Circuit Court of Bolivar County, Mississippi, Second Judicial District filed November 20, 1962, affirming the conviction of appellant, Aaron Henry by the County Court of Bolivar County, Mississippi, May, 1962 Term.

Appellant was arrested on March 3, 1962, and taken into custody by the Chief of Police of Clarksdale, Mississippi, for disorderly conduct, a misdemeanor under Section 2087.5, Mississippi Code of 1930 (R. 121, 122, 206). On March 14, 1962, he was tried before a Justice of the Peace, found guilty of disturbing the peace, fined a sum of five hundred dollars, and sentenced to six months in jail (R. 2). An appeal was taken to the County Court

of Bolivar County where a trial de novo was held, resulting in appellant's conviction for disturbing the peace, a misdemeanor under 2089.5, Mississippi Code 1930. In both instances trial was based upon an affidavit that on March 3, 1961, Aaron Henry did willfully and unlawfully disturb the peace of Sterling Lee Eilert by indecent and offensive conduct toward Eilert in that he used obscene language to him and placed his hand on the leg and private parts of Eilert. This affidavit was sworn and subscribed to by Frank O. Wynne, Jr., Prosecuting Attorney for Bolivar County, on March 14, 1962 (R. 4).

The Justice of the Peace before whom appellant was tried, certified to the court below that all original papers in this action were attached to the record of proceedings before him. Certified as original papers were one cost bill, one appeal bond, eight subpoenas, one capias and one general affidavit dated March 14, 1962 (R. 2).

The only testifying witness to the offense was complainant Sterling Lee Eilert who claimed that while hitchhiking from his home in Memphis, Tennesse, to Cleveland, Mississippi, on March 3, 1962, he was picked up in Clarksdale, Mississippi, at approximately 5:00 or 5:30 P.M. by a Negro male driving a black car who, Eilert Claims, engaged him in conversation concerning sex and reached across the front seat of the car and "grabbed the crotch of (his) pants, touching his private parts" (R. 25, 33). The offense occurred in Bolivar County.

Eilert testified that he went to the police station in Shelby, Mississippi, where he met Manuel Nasser, Deputy Sheriff of Bolivar County, and Police Officer Charles Reynolds of Clarksdale (R. 34). He testified that he complained of the earlier events and supplied Nasser and

Reynolds with the last four digits of the automobile's license plate (R. 34). Reynolds supplied the remaining license plate digits on his own initiative and requested identification of a single vehicle, that of the appellant.

In the tape-recorded statement taken from Eilert in the Clarksdale police station by Pearson, the complaining witness stated: "They knew who I was talking about right away. Said he was associated with the NAACP or something." On cross-examination he also testified that he was picked up at approximately 5:30 P. M. at Clarksdale, that he left the car at approximately 6 P. M. and that he signed certain papers at the Shelby police station.

Appellant was arrested at his home in Clarksdale shortly after 7:00 P.M. that evening by Chief of Police Collins (R. 121, 205, 207). At the police station in the course of questioning by Coahoma County attorney Thomas H. Pearson, in the presence of Chief of Police Collins and Mayor Kincaid of Clarksdale (R. 125, 206), appellant denied charges and stated that, between 5 and 6 P.M. on the evening of March 3, 1962, he was at the Melcher Funeral Home in Clarksdale from which point he went directly to his home (R. 203-204). While appellant was under arrest and in the custody of the Coahoma and Bolivar County authorities, Chief of Police Collins with other officers went to appellant's home and searched his automobile which had been parked in the carport attached to appellant's home since some time prior to his arrest. A search warrant was neither sought nor secured.

There was overwhelming corroborating evidence that during the time period within which the offense was committed, appellant was in Clarksdale and at his home (R. 147, 149, 150-151, 152, 160-161, 168, 188).

Through the testimony of seven witnesses, it was established that between 4:45 P.M. and 5:20 P.M. on March 3, 1962, the appellant was at the Melcher Funeral Home and that subsequent to 5:20 P.M. until the time of his arrest he was at his home.

Following his arrest, appellant, handcuffed and chained, was taken by Bolivar County authorities to their county jail where he remained until released on bail on the following day.

Prior to commencement of the trial, appellant moved to dismiss the case on the ground that the Justice of the Peace had never acquired jurisdiction of the cause due to the absence of a proper affidavit, consequently impairing the jurisdiction of the court below. This motion was denied initially, and when reiterated at the termination of the state's case and at the termination of the appellant's case. Appellant moved for a directed verdict on the following grounds: (1) There was no evidence of an affidavit of proper complaint—the warrant under which appellant was arrested was illegal and contrary to due process; (2) the search of appellant's automobile subsequent to his arrest was an illegal search and seizure, contrary to due process, therefore depriving him of the rights secured to him by the Fourteenth Amendment of the United States Constitution; (3) that the state had failed to prove its case beyond a reasonable doubt. This motion was denied as were motions for a directed verdict. A motion for a new trial was filed in the County Court of Bolivar County on May 22, 1962, and an order overruling the motion for a new trial dated May 22, 1962 was filed on May 29, 1962. Notice of Appeal to the County Court of the Second Judicial District of Bolivar County, Mississippi was filed on May 22, 1962, and the Order of

that Court affirming conviction without an opinion was entered on November 20, 1962. Notice of Appeal to this Court was filed on November 20, 1962, and a Petition for Allowance of Appeal to the Supreme Court of Mississippi was served on adverse counsel on November 16, 1962, and was filed with the Clerk of the Circuit Court of Bolivar County, Mississippi, Second Judicial District on December 15, 1962. On December 15, 1962, an order was entered allowing the appeal to the Supreme Court of Mississippi.

ARGUMENT

I.

ASSUMPTION OF JURISDICTION OF THIS CAUSE BY THE TRIAL COURT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS.

Jurisdiction of a Justice of the Peace over persons charged with misdemeanors is acquired as set forth in Section 1832 of the Mississippi Code of 1930 after an affidavit of the commission of the crime is lodged with the Justice of the Peace, thus authorizing him to issue a warrant for the arrest of, and to try, the accused offender. The sine qua non of the statute is the affidavit from which emanates the power to arrest, try and punish an offender. *Bigham v. State* 59 Miss. 529; *Powell v. State* 17 So. 2d 524; *Conner v. State* 17 So. 2d 527. Legal prosecution must begin with an affidavit charging the commission of a crime. *Ratcliff v. State* 26 So. 2d 69. The absence of the affidavit results in a jurisdictional defect, irreparable on appeal in the Circuit Court. *Smith v. State* 24 So. 2d 85; *Powell v. State*, supra. Conviction, in the absence of a valid affidavit is an unconstitutional denial of due process. *Bramlette v. State* 8 So. 2d 234.

The certificate of the Justice of the Peace that the original affidavit in this cause is that of Frank Wynne, Jr. dated March 14, 1962 (R-2) is dispositive of that issue. The absence of competent evidence of the existence of an affidavit on March 3, 1962, the date of commencement of prosecution of appellant, requires reversal of conviction by a court clearly lacking jurisdiction to proceed. *Bramlette v. State,* supra. Omissions in the transcript of record from the Justice of the Peace Court cannot be supplied by incompetent evidence. *Tillman v. State,* 35 So. 2d 91. Consequently the assertion by the prosecuting attorney that his affidavit constituted a valid "amended affidavit" (R-83) (a statement directly contradicted by appellant's attorney,) (R-83)) validating all proceedings is without weight. Acceptance of such evidence by the court below (R-86) constituted reversible error as an unconstitutional denial of due process to appellant. *Bramlette v. State, supra.*

II

Article 3, Section 23 of the Constitution of Mississippi mandates against unreasonable search and seizure and against the unauthorized issuance of warrants for arrest. *Millette v. State* 138 So. 788; *Leflore v. State* 22 So. 2d 368; *Kelly v. State* 43 So. 2d 383. The right to be free from unreasonable search and seizure as described in the Fourth Amendment to the federal constitution is binding upon the state through the Due Process Clause of its Fourteenth Amendment. *Wolf v. Colorado* 338 U.S. 25; *Elkins v. United States* 346 U.S. 206. Similarly, the proscription against the issuance of warrants without probable cause as described in the Fourth Amendment to the United States Constitution, grants a right to be free from unauthorized arrests at the hands of State author-

ities. *Ex parte Burford* 3 Cranch 448 *McGrain v. Daugherty* 273 U.S. 135.

A search, with or without a warrant, is unreasonable when made merely for evidentiary material which was not the instrument or means by which a crime was committed, the fruits of a crime, a weapon by which escape might be effected or property, the possession of which is a crime. *Williams v. United States* 263 F. 2d 489, and any conviction based upon evidence seized in violation of the federal or state constitution cannot be sustained. *Boyd v. United States* 116 U.S. 616; *Weeks v. United States* 232 U.S. 383; *Agnello v. United States* 269 U.S. 20; *Sequrola v. United States* 275 U.S. 106; *Mapp v. Ohio* 367 U.S. 643; *Kelly v. State*, supra.; *Brooks v. State* 46 So. 2d 94.

That appellants arrest on March 3, 1962, pursuant to a warrant charging him with disorderly conduct was unauthorized and illegal is amply supported by the cases cited in Point I.

The record reflects that sometime after the arrest of appellant, the chief of police of Clarksdale unauthorizedly and unlawfully searched appellant's automobile which was then parked in the carport to his home. (R 126-127; R 171) The search was accomplished without a search warrant while appellant was in the custody of the authorities, rendering that search illegal and in violation of appellant's rights guaranteed by the United States Constitution and by the Constitution of the State of Mississippi. *Go-Bart Co. v. United States* 282 U.S. 344; *United States v. Lefkowitz* 285 U.S. 452; *Martin v. State* 64 So. 2d 629; *Lancaster v. State* 195 So. 320.

It is claimed that this search, commenced solely in the presence of the official conducting the illegal search, re-

sulted in the discovery that the automobile's cigarette lighter was inoperable and the right hand ash tray filled with chewing gum wrappers. (R 126, 127) The record is persuasive that the purpose of the "discovery", the fruit of an unlawful search, was to corroborate charges made by the complaining witness Eilert (R-32) which were amply contradicted by numerous witnesses (R 147, 149, 150-161, 152, 160-161, 168, 188, 200; R 78; R 121). Thus this unlawfully discovered evidence was crucial to the State's case and the conviction achieved was procured by evidence obtained in violation of appellant's constitutional rights. Mapp v. Ohio, supra; Brooks v. State, supra.

Exploratory searches and those conducted upon the basis of suspicion have been condemned by this Court and by the Supreme Court of the United States. United States v. Lefkowitz, supra; *Martin v. State*, supra; *Acuna v. State* 54 So. 2d 256. Reliance upon evidence illegally obtained to bolster the testimony of a witness is reversible error. *Fore v. State* 23 So. 70. The obvious purpose of the search of the automobile does not fall within those delineated as lawful in the *Williams* case.

The trial court committed grave error in failing to direct a verdict of acquittal in the face of such evidence (R 145) which infected the entire ttrial to an extent sufficient to deny the due process accorded by both the federal and Mississippi Constitutions. Convictions procured by the introduction of such evidence, obtained in violation of constitutional and fundamental rights must be set aside. *Tucker v. State* 90 So. 845; *Lancaster v. State* supra; *Brooks v. State* 46 So. 2d 94.

Apart from the constitutional deficiencies in the search itself, the initial illegality of the arrest of appellant renders the later search unreasonable, illegal and un-

constitutional. *Contee v. United States* 215 F. 2d 324; *Judd v. United States* 190 F. 2d 649.

Constitutional rights rise above rules of procedure and require that every person be granted a fair and impartial trial. *Brown v. State of Mississippi* 279 U.S. 278; *Fisher v. State* 110 So. 361; Floyd v. State 148 So. 2d 226. Failure to accord those constitutional rights require reversal. *Brooks v. State*, supra.

III

APPELLANT'S CONVICTION DENIED DUE PROCESS OF LAW BECAUSE IT RESTED ON INSUFFICIENT EVIDENCE OF THE ESSENTIAL ELEMENTS OF THE CRIME, AND BECAUSE OF ERROR IN THE COURT'S RULINGS.

The only evidence that appellant was the person who importuned Eilert, is based upon the uncorroborated testimony of that witness. (R-26) The record is pursuasive that when Eilert originally complained of the incident, he provided a general physical description of a Negro male, a black car, (R 77, 199) and four digits of an automobile license. His original statement indicated that ascertainment of the identity of his alleged assailant was provided by the officers to whom he complained (R-200), particularly Officer Reynolds (R 93, 109). It is significant that Officer Reynolds supplied the digits missing from Eilert's description and ascertained the ownership of but one, specific automobile—that of appellant. (R-109) Additionally, at the time Eilert claims he identified appellant, the latter was the only Negro male provided by the authorities for identification. (R-36, 107) Such evidence is insufficient when based totally upon the statement of an unschooled and unsophistocated boy (R-39)

to whom all Negroes look alike. (R-49) The evidence does not support appellant's conviction, when considered together with corroborated testimony placing appellant in Clarksdale and at his home at the time of the incident. (R 147, 149, 150-151, 152, 160-161, 168, 188; R-47, 200; R-78; R-121)

The state has failed to prove the essential elements of its case beyond a reasonable doubt and the verdict was against the weight of credible evidence.

The ruling of the trial court refusing to issue two pretrial subpoenas duces tecum (R-1-9) and a similar subpoena during the course of the trial (R-81), constitutes a further denial of due process.

The conviction in the trial court was unsupported by the evidence, and a conviction without evidence of guilt is the most elementary denial of due process. *Thompson v. Louisville*, 362 U.S. 199. It violates both the Fourteenth Amendment of the United States Constitution and the Constitution of Mississippi.

CONCLUSION

WHEREFORE, for the reasons hereinabove stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

JACK H. YOUNG
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Attorneys for Appellant

By
of Counsel

CERTIFICATE OF SERVICE

I, the undersigned, Robert L. Carter, one of the attorneys for the appellant, do hereby certify that I have this day personally served on Hoke Stone, District Attorney, Lambert, Mississippi, and Frank O. Wynne, Jr., County Prosecuting Attorney, Merigold, Mississippi, a true copy of the above and foregoing brief of appellant.

Signed, this, the 28 day of March, 1963.

Robert L. Carter

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42,652

AARON HENRY — Appellant

vs.

STATE OF MISSISSIPPI — Appellee

BRIEF OF APPELLEE

JOE T. PATTERSON, Attorney General

By G. Gerland Lyell, Jr.
Assistant Attorney General

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42,652

AARON HENRY ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellant was charged in Justice of the Peace Court of Bolivar County, Mississippi with disorderly conduct by disturbing the peace of one Sterling Lee Eilert, by making indecent statements and proposals to him and at the same time placing his hand upon the private parts of Eilert, a misdemeanor under Section 2089.5, Mississippi Code of 1942, Recompiled. Upon conviction and sentence he was tried de novo in the County Court of Bolivar County, found guilty and sentenced to pay a fine if $250.00 and serve sixty days in jail. Upon review by the Circuit Court of Bolivar County, the County Court conviction was affirmed and it is from that order of affirmance that this appeal is prosecuted.

STATEMENT OF FACTS

On the afternoon of March 3, 1962, Eilert was hitchhiking to Cleveland, Mississippi from his home in Memphis, Tennessee. At an intersection at Clarksdale he

was picked up by appellant. As they neared Shelby, Mississippi, appellant questioned Eilert about his possible sex life and, in language unnecessary to repeat here, not only attempted to arouse Eilert but reached over and touched his privates. Eilert was able to get out of the car at Shelby, where he went to the police station and reported the matter. There happened to be an off-duty Clarksdale policeman present at the Shelby Police Station. Eilert gave the policeman a description of appellant. He described his car in detail and also gave them the license number of the car, except that the county and weight designation, which appears to the left of all license numbers, was obscured by a reflector or emblem of some sort. The Clarksdale policeman radioed police headquarters in Clarksdale for an identification of any such car which may have had that license number in Coahoma County and it was immediately determined that the car with those numbers was registered to appellant and it was known to the Clarksdale authorities that the appellant's car was a Pontiac Star Chief which fit the description given by Eilert. As a result of this identification of the car and, based on the other descriptive information of the individual driving the car, it was established that it was appellant and Eilert then made a formal charge against appellant while still in Shelby. A warrant was issued and taken by the Clarksdale policeman to the Clarksdale Police Department where the Clarksdale Chief of Police took the warrant to appellant's house and arrested him. That same evening Eilert identified appellant when he saw him at the Clarksdale Police Station.

Appellant offered several witnesses, attempting to establish an alibi, whose testimony, if true, would have put appellant at a funeral home in Clarksdale at or about

the time those events took place en route to and at Shelby.

Eilert also advised the authorities that a cigarette lighter in appellant's car was inoperable and that one of the ash trays was filled with Dentyne chewing gum wrappers. After appellant was arrested and jailed, the Clarksdale Chief of Police went to his home, obtained the keys to appellant's car from his wife, opened the car, found as Eilert had advised them that the cigarette lighter did in fact not work and also found the quantity of Dentyne chewing gum wrappers in the ash tray as described by Eilert. This was also witnesses and remarked on at the time by appellant's wife, daughter and others present.

ARGUMENT

POINT I

ASSUMPTION OF JURISDICTION OF THIS CASE BY THE COUNTY COURT WAS NOT A VIOLATION OF DUE PROCESS.

Eilert "signed something saying what the charges were" at Shelby (R. 59). A warrant was issued, sent to Clarksdale and appellant was arrested. When the case came to trial subsequently on March 14, 1962 the affidavit was amended by the County Attorney and copies were furnished attorneys for appellant (R. 83). The amended affidavit was certified to the County Court by the Justice of the Peace but the original affidavit seems to have been omitted and perhaps lost. Under this point appellant argues that the original affidavit was a necessary part of the Justice of the Peace papers to confer jurisdiction on County Court on appeal. While a multitude of cases are cited, none are directly in point but only deal with

cases where the transcript from the Justice of the Peace Court has been incomplete and fatally defective, while in the case at bar the transcript certifies up to the County Court the very affidavit upon which appellant was there tried and it appears from the statement of the County Attorney into the record (R. 83) that the amended affidavit was executed with the approval of the Justice of the Peace before trial in his Court and was sworn to before him.

It is hard to conceive how appellant could complain of the amendment to the affidavit before trial in the Justice of the Peace Court when the same amendment or amendments could have been made in County Court under Section 1202 and 2535, Mississippi Code of 1942, Recompiled. As a matter of fact, counsel for appellant (R. 85-86) admitted that the affidavit in this record (R. 4) was the affidavit upon which appellant was tried. While the existence and content of the affidavit signed by Eilert at Shelby on March 3, 1962 may have been of importance in determining the validity of the arrest of appellant had the question been properly raised, the absence of that affidavit does not diminish the jurisdiction of either the Justice Court or the County Court since appellant was tried on the amended affidavit.

POINT II

AS TO THE SEARCH OF APPELLANT'S CAR

The State has no argument with the authorities cited by appellant under this point. They are all very well known authorities on the subject of arrest, search and seizure, but they have no application to the case at bar.

The Chief of Police of Clarksdale went to the home of appellant to look in his car for corroboration of Eilert's

story with respect to the inoperable cigarette lighter and the qualitity of Dentyne chewing gum wrappers in the ash tray. The Chief went to appellant's door and knocked on it (R. 126-127). Appellant's mother-in-law came to the door. The Chief asked her if he could look at the car. She said, "Wait a minute and let me get Noel (appellant's wife)." When his wife came to the door he told her he would like to look at her car and she said, "Let me get the keys." When the Chief stated that he did not need the keys, that all he wanted to do was look inside, she replied, "Well, it is locked up, I will have to get the keys for you to look at it." She then handed him the keys and the Chief, The Mayor of Clarksdale, appellant's wife, mother and father-in-law, and appellant's little girl walked out to the car where the Chief unlocked it, plugged in the cigarette lighter and looked in the ash try. The lighter was found inoperable as described by Eilert and the quantity of Dentyne chewing gum wrappers was found. Appellant's little girl stated that she had "put them in there about three days ago."

Thus, the search of appellant's car was made with the full and complete consent and cooperation of his wife and other members of the family. While it is an open question in Mississippi as to whether or not a wife has the implied authority to authorize a search of her husband's car, it is respectfully submitted that in this case such implied authority was present and is obvious in view of the fact that the car was locked and she had the keys. Having such custody and control of the car in the absence of her husband, such authority should be implied. As held in *Goodman vs. State*, 130 So. 285, 158 Miss. 269, a search of property forbidden by the Constitution without a warrant or probable cause is such only as constitutes a trespass. There is no element of trespass present in this case.

The Chief of Police went to the door, stated his wishes and appellant's wife got the keys and aided him in the search.

This Court would undoubtedly notice the Federal case of *Cofer v. U. S.*, 37 Fed. 2d 677, digested in *Mississippi Digest, Searches and Seizures, Key No.* 7 27, wherein the syllabus states the holding of that case to be that the defendant's wife was without authority to bind her absent husband by consenting to an unauthorized search of their dwelling. However, an examination of this case will reveal that the statement is predicated upon *Amos v. U. S.*, 255 U.S. 313, 41 Sp. Ct. 266, 65 L. Ed. 564. An examination of Amos reveals that such question was pretermitted in that case as not necessary of decision because the wife was under coercion and it was obvious that no waiver was intended or effected. See annotations pro and con in 50 *ALR* 2d 531; 31 *ALR* 2d 1078; 150 *ALR* 572; 134 *ALR* 823, 58 *ALR* 740. See also 79 *CJS, Searches and Seizures*, Section 62 (d).

Furthermore, had the evidence of the Chief of Police, obtained as a result of the search of the car, been incompetent or otherwise inadmissible, no objection was made at the time it was offered and appellant cannot complain on appeal in the absence of timely objection. It is a fundamental rule of appellate practice that seasonable objection to evidence must be made to avail anything on appeal. *Johnson v. State*, 70 *So. 2d* 926, 220 *Miss.* 452; *Baggett v. State*, 69 *So. 2d* 389, 219 *Miss.* 583; *Gillespie v. State*, 61 *So. 2d* 150, 215 *Miss.* 380; *Bennett v. State*, 52 *So. 2d* 837, (*NOR*); *White v. State*, 30 *So. 2d* 894, 202 *Miss.* 246 and *Poole v. State*, 94 *So. 2d* 239, 231 *Miss.* 1, *and* scores of other cases digested in *Mississippi Digest, Criminal Law, Key Nos.* 1028, 1030, 1036.

Still further, appellant cannot complain of the testimony of the Chief of Police with respect to the search of the car when appellant's own counsel elicited the same information on direct examination of appellant's wife (R 160-161). It is equally fundamental that a defendant cannot complain of State's evidence introduced without objection, or even over objection, where during the course of the trial the defendant's own witnesses are caused by his own counsel to testify to the same matters. In such case, error, if any, in originally admitting such evidence, is cured and the defendant is estopped to complain on appeal. Cf. *Prine v. State*, 130 *So.* 687, 158 *Miss.* 435; *Weatherford v. State*, 143 *So.* 853, 164 *Miss.* 888; *Smith v. State*, 144 *So.* 471, 166 *Miss.* 893; *Musselwhite v. State*, 54 *So.* 2*d* 911, 212 *Miss.* 526; *Spivey v. State*, 55 *So.* 2*d* 404, 212 *Miss.* 648; *Barnes v. State*, 143 *So.* 475, 164 *Miss.* 126; *Sykes v. City of Crystal Springs*, 61 *So.* 2*d* 387, 216 *Miss.* 818.

POINT III

AS TO THE SUFFICIENCY OF THE EVIDENCE.

The prosecuting witness Eilert told a straightforward story from the witness stand and he was completely unshaken by vigorous cross-examination. His testimony was very substantially corroborated by the findings of the Chief of Police of the inoperable cigarette lighter and the noticeable quantity of Dentyne chewing gum wrappers. These things could only have been known by Eilert had he actually been in the car with appellant. This Court will take judicial notice of the type of automobile license plates in use in Mississippi. It is shown by this record and known by this Court that automobile license tags are classified by weight and that, for example, the middle weight cars such as Chevrolet, Ford, Plymouth

and Pontiac will, to the left of the license tag number have the alphabetical designation "C" plus another number of smaller size than the tag number which will designate the county in which such plate was issued. Therefore, it becomes a simple matter to determine the registered owner of a car if the complete number plus the county and weight designation are known. In this case the complete tag number was known and the make of the car was known and this left the only unknown element to be the county of issuance. Having been picked up in Clarksdale by appellant, what would have been a more logical county in which to begin to search for the registered owner of the described Pontiac Star Chief? It should also be borne in mind that the policeman in Clarksdale were familiar with the description of appellant's car and, when the tag number, coupled with its description, further fortified by the druggist's insignia which partially covered the county designation, was radioed to Clarksdale, it was obvious who the car belonged to. It is so highly unlikely that a similar tag number would be found on a Pontiac Star Chief of the model number and description of appellant's car would be found in any other county in Mississippi. This should certainly amount to sufficient identification and probable cause for the arrest of appellant on a warrant issued after Eilert had made the formal charge. It would be mathematically improbable that, out of the tens of thousands of license tags issued in Mississippi each year, one of the other 82 counties would have issued a tag of that same number to a Pontiac Star Chief of that model and description. Cf. cases annotated in 47 *ALR* 2*d* 1444.

Appellant produced an array of witnesses in an attempt to establish an alibi at the critical time. As with any other witness, it is the jury's function to pass upon

the weight, credibility and worth of evidence adduced through alibi witnesses. *Prisock v. State*, 141 *So.* 2*d* 711. Miss. ; *Cobb v. State*, 108 *So.* 2*d* 719, 235 *Miss.* 57; *Passons v. State*, 124 *So.* 2*d* 847, 239 *Miss.* 629.

CONCLUSION

Wherefore, it is respectfully submitted that the evidence in this case is strong against appellant and the jury was amply justified in accepting the State's version. The verdict of the jury and the judgment of the Court should not be disturbed.

Respectfully submitted,

JOE T. PATTERSON, Attorney General

By

Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the Brief of Appellee, State of Mississippi, to Honorable Robert L. Carter, 20 West 40th Street, New York 18, New York and Jack Young, Attorney at Law, 115½ North Farish Street, Jackson, Mississippi.

This the 9th day of May, A. D., 1963.

ASSISTANT ATTORNEY GENERAL

APPENDIX 4

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42652

AARON HENRY — Appellant

vs.

STATE OF MISSISSIPPI — Appellee

SUGGESTION OF ERROR
AND BRIEF IN SUPPORT
THEREOF

JOE T. PATTERSON, Attorney General
By G. Garland Lyell, Jr.
Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42,652

AARON HENRY ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

SUGGESTION OF ERROR

Comes the State of Mississippi by G. Garland Lyell, Jr., Assistant Attorney General, and respectfully suggests that this Honorable Court erred in its decision in this case handed down June 3, 1963 in the following respects:

I.

The case of *Brooks vs. State*, 209 *Miss.* 150, 46 *So. 2d* 94, is not decisive of the instant case for the reason that in the instant case, while appellant's attorneys did not object to the admission of certain evidence obtained as a result of an unlawful search, there was only one such instance and such did not make this case "a most unusual one" as was the Brooks case and it cannot be legally said that the failure to object to the evidence so infected the case as to deny due process of law.

II.

In its opinion in this case, this Honorable Court completely ignored the State's argument, amply supported

by authorities, as to the estoppel of appellant to claim error on appeal with respect to the evidence unlawfully obtained when appellant himself, through his own witnesses, developed the identical testimony even to a greater degree.

Respectfully submitted,

JOE T. PATTERSON, Attorney General

By

Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Suggestion of Error to Robert L. Carter, 20 West 40th Street, New York 18, New York and Jack Young, 115½ North Farish Street, Jackson, Mississippi.

This the 7th day of June, A. D., 1963.

ASSISTANT ATTORNEY GENERAL

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42,652

AARON HENRY ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

BRIEF IN SUPPORT OF SUGGESTION OF ERROR

It is with deference that the suggestion of error herein is filed. It would not have been filed were the writer not of the definite opinion that it should be sustained. As this Court well knows, the writer of this brief in the last six years, at times with his associates, has filed perhaps over six hundred briefs in criminal appeals before this Court. While the files have not been checked, it is safe to say that suggestions of error have been filed in only three or four cases reversed by this Court. The writer is not alone in his feeling with respect to the opinion of the Court in this case. It has been discussed with numerous lawyers and judges and each has urged the filing of this suggestion of error that the Court might reconsider its decision.

The State has no argument with the Court's decision that the wife of appellant had no authority to waive appellant's constitutional rights with respect to the search of his automobile and readily accepts the opinion of the

Court on that phase of this case, but, after exhaustive research, this writer has been unable to find a single case from this or any other jurisdiction to support the conclusion of this Court that this case falls in that class of cases represented by *Brooks vs. State*, 209 Miss. 150, 46 So. 2d 94.

The Court's decision is predicated solely on the failure of appellant's counsel to object to the testimony of Police Chief Ben Collins with respect to the inoperable cigarette lighter and the quantity of Dentyne chewing gum wrappers in the ash tray, strong corroborative evidence of the prosecuting witness's testimony, which the Chief of Police found as a result of an unlawful search of appellant's car after appellant had been taken to jail. This Court would excuse the failure of counsel to object on the ground that they were "non-resident attorneys who have traveled great distances to appear in defense of persons charged with misdemeanors and minor offenses, but who are not adept in the technique of jury trials in criminal court in Mississippi," yet this Court completely overlooked the fact that a Mississippi attorney also actively participated in the trial and in the proceedings antecedent thereto (R. 13), which local attorney is presumed, in the absence of any evidence to the contrary, to have sufficient skill and learning to defend an accused adequately. *Wooddell vs. State* (*Md.*), 162 A2d 468; *State vs. Griffith* (*Wash*), 328 P2d 897.

While the State of Mississippi would never advocate the denial of constitutional rights, it has always been the law that such rights can be waived. However, there is an interesting trend in the reported cases today that should be stopped at a reasonable level and has been stopped within bounds of reason by all those Courts, both State and Federal, in which the matter has been considered;

that is the effort on appeal after conviction to then try the lawyers involved. The courts formerly tried the accused, then in more recent years the Constable in effect became a defendant and now convicted defendants seek relief on appeal by trying their own lawyers. While in the case at bar no reply brief was filed by appellant and the soundness of the State's brief was not questioned, this Court on its own, but without using such language, has in effect held that appellant's counsel was inadequate in their representation.

The practice of law is not an exact science. No two lawyers will try cases alike, not even closely associated partners. No two lawyers will always agree on trial tactics. Yet this Court, in its opinion in this case, has departed from the record and determined as a fact that the New York lawyers involved in this case did not know enough about Mississippi trial "technique" to seasonably object to Chief Collins' testimony, at the same time ignoring the fact that there was a Mississippi lawyer also in the case. It is inconceivable to this writer, even in the absence of the local lawyer, that Robert L. Carter and Jawn A. Sandifer were so inexperienced or inept as to not know that at some stage in the trial an objection to Chief Collins' testimony had to be made in some form for it to be excluded. There was no objection, no motion to suppress nor was the admissibility of the tesimony challenged on motion for new trial. The only reasonable conclusion to draw is that as a matter of strategy defense counsel allowed the testimony of Chief Collins to go in without objection. This is further indicated by the testimony of Willie Singletary, Jr. (R. 184 et seq), by whom the defense attempted to establish that on January 27, 1962, prior to March 3, 1962, the date of the occurrence involved, a new cigarette lighter had been put in the car.

This was an obvious effort to discredit the witness Eilert and the witness Collins with respect to the inoperable condition of the cigarette lighter. The testimony of Singletary was not mentioned in the brief filed by the State in this case because it was so obvious to this writer that appellant was estopped from claiming error on Chief Collins' testimony by virtue of having produced the wife of appellant as a witness and going into the details of the search through her.

Fully realizing that an ex parte statement of fact has no place in a brief, since this Court has departed the record in assuming that the New York lawyers did not know how to exclude the testimony of Chief Collins, it must be said that when the opinion of the Court was read over the telephone this week to the District Attorney who prosecuted this case, he was shocked at the basis upon which the opinion was predicated and avised this writer that, *contrary to the assumption of this Court with respect to the New York counsel, when Chief Collins was first questioned about his search of the car, attorney Jawn A. Sandifer rose as if to object but was pulled back or motioned back into his seat by attorney Robert L. Carter.*

In reviewing this case, the Court should be interested to know that, according to Martindale-Hubbell, Robert L. Carter was born in 1917, obtained an AB degree from Lincoln University in Pennsylvania and an LLB degree from Howard University in Washington, D. C. and was admitted to practice in 1945. He is of regular, full time counsel for the NAACP in New York City and, since the appointment of Thurgood Marshall to the Federal Judiciary, has been general counsel for that organization. Jawn A. Sandifer was born in 1914, attended Johnson C. Smith University, Charlotte, North Carolina, gained his LLB

degree from Howard University, Washington, D. C., and was admitted to practice in 1943. R. Jess Brown was born in 1912, received a B.Ed degree from Illinois State Normal University, an LLB degree from LaSalle Extension University, Chicago, Illinois, was admitted to practice in Mississippi in 1953 and this Court has judicial knowledge of the extensive experience he has had in trial and appellate work.

In the brief filed herein for the State of Mississippi it was argued and, in its opinion, this Court reaffirmed the law to be that parties prejudiced by the introduction of inadmissible evidence are required to object to its inadmissibility at the time it is offered and that error cannot be predicated upon admission of evidence to which no objection was made. This Court concluded that, "In short, *under ordinary circumstances*, error could not be predicated upon the admission of such testimony." (Emphasis added) The Court then goes on to make an exceptional case out of this one because of the fact that there were non-resident attorneys representing appellant who were not adept in the technique of jury trials in criminal court in Mississippi, adding, that "This Court is conscious of the fact that such a situation has cast an unusual burden upon the trial judges to determine how to eliminate objectionable testimony, when no objection is made, and at the same time insure a fair trial by due process of law. * * *"

At the outset, this Court has never held that the trial court, except in rare cases such as the Brooks case, should act as counsel for a defendant. In *Gangloff vs. State*, (1958) 232 Miss. 395, 99 So. 2d 461, Gangloff acted as his own counsel and had certain complaints on appeal as to which his possible rights had not been protected below. In connection therewith, the Court said "There is nothing

in the law which obligates or even permits a trial judge to ignore the law, or become a partisan in favor of a litigant who does not have an attorney, or see that such litigant has presented every legal principle of which learned and astute counsel, after study and preparation, may conceive. While trial judges are invariably more lenient and indulgent toward such litigants, charity must not go to the extent that a party, without counsel, becomes a privileged litigant and is granted rights and immunities not afforded by law and not allowed to those who obtained counsel. If a defendant choses to be his own lawyer, he has that right; *but such right does not license him to ignore the law, nor make him a ward of the court or the client of the trial judge.*' (Emphasis added)

Thus, under Gangloff, this Court would not have reversed the case at bar even had he not had counsel at the trial.

In the case at bar this Court held under *Brooks vs. State*, supra, that appellant had been denied due process of law by the admission of the evidence complained of only on appeal. This position is in stark contrast to *Simmons vs. State*, 197 Miss. 326, 20 So. 2d 64, cert. den. 65 Sp. St. 590, 324 U.S. 821, 89 L. Ed. 1391. In that case there was a belated effort on the part of Simmons to show that an alleged confession was used against him in the trial which had been procured by force and intimidation, as to which the record was lacking in proof. This Court said: "His contention, now made, that in his trial he was denied due process cannot be maintained for the elemental reason that he was given full opportunity to be heard, and the guaranty of due process does not require more than one such opportunity. Every person

must have his day in Court; but this is singular, not plural."

Thus, due process of law is not denied by the reception of evidence, material and relevant, to which timely objection is not made. To like effect, see cases cited in the State's brief filed herein. The Court's opinion recognizes that this is the universal rule.

The State of Mississippi has no argument with the opinion of this Court reversing the Brooks case. However, it is purely and simply not applicable to the case at bar. In the Brooks case the appellant's constitutional rights were violated in several particulars set out in its opinion, as to which there was not a single objection at the trial. The Court was kind to the attorney who sat with Brooks during the trial for it is obvious from the Court's opinion that he sat throughout the trial like an aphonic dummy either completely ignorant of his duties or completely indifferent and callous to the fate of his client. As this Court said in the Brooks case, "This case is a most unusual one" and as it repeated, "We repeat that this is a most unusual case." It certainly was and any appellate court in the land would undoubtedly have reversed a conviction where a defendant's rights had been so callously and effectively ignored and trampled both by the State and by his own counsel. *Brooks* falls within a class of cases, many of which are discussed in a 70 page annotation under *Lunce vs. Overglade*, 74 ALR 2d 1384, beginning at page 1390. In such class of cases, it is held that the incompetency (or one of its many synonyms) of private counsel for a defendant in a criminal prosecution is neither a denial of due process under the 14th Amendment, nor an infringement of the right to be represented by counsel under either the Federal or State Constitutions, unless *the attorney's representation*

is so lacking that the trial has become a farce and a mockery of justice. This Court did not use such words in its opinion in Brooks but such was the obvious case.

It must also be pointed out to this Court, though repetitious, that, in cases subsequent to Brooks, this Court has not treated the admission of evidence obtained as a result of an unlawful search to be a denial of due process when admitted without objection by the defense. *Johnson v. State*, 220 Miss. 452, 79 So. 2d 926 and other cases cited in the original brief and literally scores of other cases digested in *Mississippi Digest, Criminal Law*, Key Nos. 1028, 1030 and 1036.

It is also interesting to note that, while this Court ignored the presence and representation of appellant by R. Jess Brown, a Mississippi attorney, and reversed on account of the assumed ignorance of New York counsel as to Mississippi procedural requirements, an assumption not even based upon any assertion by appellant's counsel on this appeal. Additional counsel was obtained on the appeal in the person of Jack H. Young, another experienced Mississippi attorney, and yet no reply brief was filed by any of appellant's local or New York attorneys to refute the State's position or in any way excuse failure to object below.

It would unduly lengthen this brief to discuss all of the cases in the annotation in 74 *ALR* 2d referred to above but this Court is implored to carefully consider the cases therein found and it is sincerely believed that the conclusion originally reached by this Court will be reversed by virtue thereof.

The Court must bear in mind that this is not a case involving any possible State action tending to cause or causing a denial of counsel to appellant. He was accorded

the highest right, that is to counsel of his own choosing. As this Court found in *Carraway v. State*, 170 Miss. 685, 154 So. 306, "This appears to be no longer a trial of appellant's case, but an investigation of the trial judge and the appellant's attorney, Whetstone. The record clearly shows that the family of Carraway employed and paid Whetstone as appellant's counsel. He had the right to choose any lawyer he saw fit, and it would be a dangerous proceeding if a court declined to permit the counsel chosen and selected by the family of accused and accepted by the appellant, to represent the appellant in the trial of his case." Cf. *Hendrickson vs. State* (Ind.), 118 NE 2d 493 and *Wilson vs. State* (Ind.), 51 NE 2d 848.

In addition to the multitude of cases annotated in 74 ALR 2d, the following cases are distinctly applicable to the case at bar.

In *Lotz vs. Sacks*, (CA 6th Ohio), 292 Fed. 2d 657, it was claimed on appeal that defense counsel rendered ineffective representation and the 6th Circuit dismissed such claim with the observation that the transcript established (as the one in the case at bar certainly should) that the defendant was represented by counsel constantly on the alert in making proper and relevant objection to what counsel considered to be objectionable remarks made by the Prosecuting Attorney in his opening statement and, quoting from *O'Malley vs. U. S.*, (6th Cir.) 285 Fed. 2d 733, 734 as follows, "Appellant's counsel was of his own choosing. Under such circumstances the rule has been often stated that only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court, can a charge of inadequate legal representation prevail." This writer full well realizes that there is no charge on the part of

appellant in the case at bar that he was inadequately represented by virtue of the failure of counsel to object to the testimony of Chief Collins, but the opinion of this Court is necessarily predicated upon that premise.

In answer to a similar contention in *Popeko vs. U. S.*, 294 Fed. 2d 168, the 5th Circuit Court of Appeals held that without a showing of deliberate purpose on the part of counsel to prevent defendant from obtaining a fair trial, or action so grossly negligent as to amount to substantially the same thing, the defendants cannot relieve themselves of errors, mistakes or misjudgments of their counsel by having the trial set aside, making the observation that it "would be to put a premium on incompetent and inefficient counsel whose mistakes could be more certainly relied upon as effective aid for reversal than the sound and competent advice and trial conduct of the most efficient counsel," adding further that when a defendant selects his own counsel, the counsel truly represents the defendant, and no mistake or error of his, made in good faith and with an honest purpose to serve his client, can be made the basis of a claim of reversible error.

Likewise, in *People vs. Strader* (Ill.), 177 NE 2d 126, it was held that in cases where a defendant is represented by counsel of his own choosing, a conviction will not be reversed for poor representation unless it can be said from the record that representation was of such a low caliber as to amount to no representation at all or was such as to reduce the trial to a farce.

In *People vs. Robillard* (*Calif.*), 358 P. 2d 295, trial strategy obviously backfired and the California Supreme Court wisely held that this was certainly no basis for saying that the minds which conceived it were incompetent. In that case the opinion emphasized that there were

two attorneys chosen and employed by the defendant, not just one, and that one of them was formerly a public defender in a nearby county and a man of considerable criminal law experience. In the case at bar we have three lawyers defending appellant at the trial, one of them an experienced Mississippi lawyer, one of them, Sandifer, about whom this writer has no information as to his experience, and the third, Robert L. Carter, being general counsel of the NAACP and an attorney of vast trial and appellate experience, all this coupled with the further employment of another experienced Mississippi lawyer, Jack Young, to assist on the appeal.

In Robillard, the California Court, like all others, held that the handling of the defense by counsel of accused's own choice will not be declared inadequate except in those *rare cases* (synonymous with "most unusual" in Brooks) where his counsel displays such a lack of diligence and competence as to reduce the trial to a farce or a sham.

The Missouri Supreme Court recently considered this matter in *State vs. Johnson* (Mo.), 336 SW 2d 668, and remarked, "However, as stated by the United States Court of Appeals, 3rd Circuit, in United States Ex Rel Darcy vs. Handy, 203 Fed. 2d 407, 426; 'There is, however, as Judge Huxman pointed out in Hudspeth, Warden vs. McDonnell, 10 Cir., 1941, 120 Fed. 2d 962, 968, 'a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel.' *It is the latter only for which the State is responsible*, the former being normally the sole responsibility of the defendant who selected his counsel. And so where, as in the case now before us, a defendant in a criminal case has retained counsel of his own choice to represent him it is settled by an overwhelming weight of authority that the commission

by his counsel of what may retrospectively appear to be errors of judgment in the conduct of the defense does not constitute a denial of due process chargeable to the State."

The Missouri Court further quoting from previous authority, stated that "when counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the State. For while he is an officer of the Court his allegiance is to his client whose interests are ordinarily diametrically opposed to those of the State. It necessarily follows that any lack of skill or incompetency of counsel must in these circumstances be imputed to the defendant who employed him rather than to the State, the acts of counsel thus becoming those of his client and as such so recognized and accepted by the Court unless the defendant repudiates them by making known to the Court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel."

To the same effect is *People vs. Pardo* (*Calif.*), 12 Cal. Reptr. 141, a 1961 case wherein the California Court, like all other states, held on the question of actions of counsel that it must have been of "such a low order as to render the trial a farce and a mockery of justice" or "it must be shown that it was 'an extreme case' and 'that the essential integrity of the proceedings as a trial was destroyed by the incompetency of counsel'." This was a case involving, as in the case at bar, an alleged unlawful search and seizure to which there was no objection at the trial and the Court further remarked that the "claimed absence of effective representation will not be sustained unless the

circumstances surrounding the trial indicate a representation so lacking in competence that it becomes the duty of the Court to observe and to correct it."

In *Johnson vs. U. S.*, CADC, 1961, 290 Fed. 2d 378, the Court of Appeals for the District of Columbia held, "absent objection, there appears to be no reason to disturb the judgment on the ground of illegal search and seizure." Cf. *Segurola vs. U. S.*, 1927, 275 U. S. 106, 48 Sp. Ct. 77, 72 L. Ed. 186.

While reversing for a combination of circumstances not present or even remotely suggested in the case at bar, Judge Wisdom, speaking for the 5th Circuit Court of Appeals in the 1960 case of *Mac Kenna vs. Ellis*, 280 F. 2d 592, said that "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

Most pertinent to the case at bar is *Arellanes vs. U. S.*, CA 9, 1962, 302 Fed. 2d 603. This case is doubly applicable to the case at bar in that inadmissible testimony was put in by the defense and there was a subsequent claim of ignorance of the rules of evidence. The Court commented that "Here, quite to the contrary, appellant himself elicited the questioned testimony. He now claims ignorance of the rules of evidence and says that the trial court should have intervened on its own motion to protect him from this 'folly'."

In the case at bar Arrelanes is authority for the principle of estoppel as well as the proposition not argued by appellant but granted to him on an assumption outside the record that appellant's counsel were not "adept in

the technique of jury trials in the criminal court of Mississippi."

The cases cited hereinabove are merely illustrative and are the most recent cases on the subject. Again, the Court is urged to consider this case in the light of those cases annotated in 74 *ALR* 2d.

By no stretch of the imagination can this case be considered to fall in the category of the Brooks case and those other unusual cases in which a combination of things or the "totality" thereof plainly indicate that the proceedings below could not be considered a trial and were a sham and mockery of justice.

Even had not the Mississippi attorney been present at the trial below and appellant had been represented only by the two New York attorneys, it goes without saying that in New York and in any other state of this Union, any lawyer who has graduated from any law school or met the admission requirements of any state bar, whether he has ever tried an adversary proceeding or not, knows full well that at some stage a timely and seasonable objection must be made to any evidence for error later to be predicated upon its admission. As pointed out by this Court in its opinion in this case, the time and place may vary from state to state; it may be by pretrial motion to suppress or by objection when offered, but, nevertheless, there must be at some stage some objection. There was no objection at any stage of this case until it reached the Supreme Court. As far as the New York lawyers are concerned, *People vs. Jakira* (NY), 193 NYS 306, 314, holds that papers unlawfully seized may be used against a defendant upon the trial unless he has made seasonable application for their return. *People vs. Finklestein* (NY), 218 NYS 2nd 341, 345, holds that a question raised for

the first time in a brief after trial is not timely or properly made.

People vs. Maiorello, (NY) 222 NYS 2nd 53, points out that under the applicable rules of the Court of General Sessions, a motion for suppression of evidence must be made prior to trial if a defendant has knowledge of grounds through affirmative allegations on which to base his motion. If this had been the only procedure known to New York counsel, they would certainly have made such a motion to suppress.

Finally, this writer feels so certain that not only did Mississippi counsel, but also New York counsel, know that a timely objection must have been made to the testimony of Chief Collins, and that some other strategy was in mind as is indicated by the record by the testimony of appellant's wife and the witness Singletary, that he would be willing to confess that this suggestion of error should not be sustained if either of the three counsel participating in this trial would respond hereto with an affidavit that he did not know that at some point in a trial in criminal court in Mississippi that an objection to such testimony must have been made.

In the paragraph beginning at the bottom of page 19 of the typewritten copy of the opinion of the Court, it is given as the opinion of the Court that a new trial should be granted because appellant's case is *based primarily upon his identity.* This Court further states that the testimony of the State's witness, Sterling Lee Eilert, is, in effect, uncorroborated without the evidence disclosed by the inspection of defendant's automobile, with the further observation that the unlawfully obtained evidence leaves no room to doubt that the witness Eilert had been in defendant's automobile. Nowhere in appellant's brief

is there any authority cited for the proposition that the uncorroborated testimony of the witness Eilert would not be sufficient. The trial Court undoubtedly was correct in denying the instruction on this subject (Record 239) and there has been no argument on this appeal with respect to the propriety of the denial of that instruction. However, it appears from (Record 242) that the trial Court did grant an instruction that defendant could not be found guilty on the unsupported and uncorroborated testimony of the complaining witness alone. Undoubtedly, this was a concession to the appellant and is not founded in law. That this is true is demonstrated by the fact that appellant in his brief on this appeal makes no mention thereof. Thus, we have a twofold proposition in connection with this instruction. First, the defendant had an instruction to which he was not entitled and, second, the defendant, himself, put in issue the testimony of Chief Collins, Noel Henry and the witness Billingsly with respect to the cigarette lighter, etc., and, under the authorities cited in the annotation in 74 *A.L.R.* 2d, appellant cannot now be found to complain. The fact that this instruction was obtained further strengthens the argument of the State that the admission of the testimony of Chief Collins with respect to what he found when he searched the car was with full awareness of all counsel for the defense that it was subject to objection. As to the remark of the Court on page 19 of its opinion that the testimony of the witness Eilert is, in effect, uncorroborated without the evidence disclosed by the inspection of defendant's automobile, this is refuted by the record and by the rest of the opinion of the Court, itself. The witness Eilert gave the tag number of the automobile, described it by model and as a Pontiac Star Chief, the information was immediately radiod to the Clarksdale police, who, together with the description of the car, which was well-

known to them, and the personal description of the occupant, immediately identified the car as being that of Aaron Henry and also recognized that Aaron Henry was the occupant. Therefore, even without the corroborating testimony of Chief Ben Collins, the jury would have been warranted in convicting appellant.

ESTOPPEL

Completely ignored by the Court was the argument of the State beginning at the middle of page 7 of its brief filed herein to the effect that appellant cannot complain of the testimony of Chief Collins with respect to the search of the car when appellant's own counsel elicited the same information on direct examination of appellant's wife (Record 160-161). As pointed out hereinabove, this was felt to be so solid a ground that the State did not even mention in its brief the testimony of the witness Singletary, likewise produced by the appellant. The testimony of appellant's wife and the witness Singletary, both put on by the defense, not only waived any objection which might have been had when the State put on proof of the results of Chief Collins' search, but emphasized the evidence. There are many ways to express it, but, suffice it to say, the universal rule is that a defendant cannot complain of inadmissible evidence, even over objection, when he, himself, reiterates by other witnesses and re-introduces the same evidence. There is a complete estoppel to complain on appeal. The Court is requested to consider the authorities cited on page 7 of the State's brief herein, as well as the authorities cited under *Section* 1843, 24A *C.J.S., Criminal Law*, to the effect that a party will not be permitted to complain of error with respect to the admission or exclusion of the evidence where his contention on appeal is inconsistent with that taken below.

CONCLUSION

Repeated reference has been made to the exhaustive annotation in 74 *A.L.R.* 2d with respect to inattentions or derelictions on the part of counsel. Particular attention is directed to that part of the annotation beginning on page 1426 or 74 A.L.R. 2d having to do with counsel from another jurisdiction; ignorant or experienced counsel. In the prefatory remarks to the annotation on this subject, the text writer says that it seems clear that the fact that private counsel representing the accused was a lawyer in another jurisdiction, but was not admitted to practice before the court in which the defendant was tried, does not conclusively show, standing alone, that such counsel was incompetent, *especially where he was associated with local counsel for the defense of the accused.* Without unduly lengthening this brief, any member of this Court who reads the cases in this annotation will readily agree that this is not a case like *Brooks vs. State*, upon which the reversal of this case was predicated.

The opinion of the Court in this case has been a matter of great concern to the office of the Attorney General. This office is charged, among other things, with the representation of the State in all criminal appeals in this Court. While Attorney General Joe T. Patterson and this assistant must, of course, do everything within their powers of persuasion to uphold the action of any trial court and any district attorney, this court must recognize that, while there is no such thing as a confession of error on the part of this department, there are certain cases in which it is held that the purity of the law and the integrity of our procedures must be maintained. This is one of those cases. It is a matter of grave concern to this office and, as stated hereinabove, to every lawyer and judge with whom this case has been discussed, to get this Court to reverse

on this suggestion of error its original opinion. No consultation has been had with the Secretary of the State Bar to determine the number of lawyers in Mississippi. It is believed to be in excess of sixteen hundred. If the opinion of this Court is to stand, anyone charged with a crime in Mississippi would be wise not to employ a Mississippi attorney, but to employ some one from Louisiana, New York, or some other state. All that would be necessary to guarantee a reversal of a conviction on appeal would be, under the present decision of this Court in this case, to have such visiting lawyer to fail to object to inadmissible evidence and, furthermore, to further prejudice his Mississippi client by introducing in defense other evidence which, upon objection, would have been held inadmissible.

At the risk of being condemned for repetition, let it not be forgotten that one of counsel of record who participated in the trial below was R. Jess Brown, an experienced trial lawyer in Mississippi. Thus, the presence of Attorney Brown negatives any unfamiliarity with procedures on the part of New York counsel for appellant.

Let it be purposely repeated that, if either Robert L. Carter, Jawn Sandifer, R. Jess Brown or Jack Young will reply to this suggestion of error and brief with an affidavit that they did not know that it was necessary to make a timely objection or motion to suppress any evidence obtained by an unlawful search or seizure, this writer will confess that the opinion of this Court is correct.

Respectfully submitted,

JOE T. PATTERSON, ATTORNEY GENERAL

By

Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Support of Suggestion of Error to Robert L. Carter, 20 West 40th Street, New York 18, New York, and Jack Young, 115½ North Farish Street, Jackson, Mississippi.

This the 12th day of June, A. D., 1963.

ASSISTANT ATTORNEY GENERAL

APPENDIX 5

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42,652

AARON HENRY ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

APPELLANT'S REPLY TO STATE'S SUGGESTION OF ERROR

Comes now Aaron Henry, appellant herein, through his attorneys, and respectfully submits that the opinion of this Honorable Court, entered on June 3, 1963, represents an accurate appraisal of the law and that a mandate should issue forthwith from this Court.

I

Contrary to the contention of counsel for the State of Mississippi, Brooks v. State, 209 Miss., 150, 46 So. 2d 94, is decisive of the instant case which presents an unusual set of circumstances completely within the Brooks case. Admission into evidence and consideration of illegally obtained evidence so infected the case as to deny appellant due process of law.

II

It is clearly established under the decisions of this Honorable Court that the State cannot rely upon the

doctrine of estoppel or waiver when it is otherwise unable to sustain its burden of proof and conviction is based in toto upon illegally seized evidence. In this case the illegally seized evidence represented the sole basis upon which the case could have been presented to the jury for determination. For these reasons, as the Court, originally stated, there was nothing else upon which a valid verdict could rest.

BRIEF IN OPPOSITION TO SUGGESTION OF ERROR

Contrary to the contentions of the State, this Court's decision is not predicated solely upon the failure of appellant's counsel to object to the testimony of Police Chief Collins with respect to an allegedly inoperable cigarette lighter and a quantity of chewing gum wrappers in the ash tray of appellant's car found in the course of an illegal search of that car. The essence of this case appears on page 18 of this Court's opinion, where the Court, quoting from Brooks v. State, 209 Miss., 150, 46 So. 2d 94, said "Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial Court cannot be raised for the first time on appeal." Since the State of Mississippi alleges that it would never advocate the denial of constitutional rights, it is submitted that acceptance of its contentions would in fact deny to appellant his constitutional right to due process of law. Appellant feels constrained to point out that by not filing a reply brief he neither agreed or consented to the State's arguments as set forth in its brief on appeal.

The brief submitted by the State, which is devoted solely to the effect of incompetent counsel, does not meet the main issue before this Court. As was stated in its opinion, this Court determined that until the testimony

of Police Chief Collins, the evidence submitted by the State was insufficient to sustain its case. In truth, the conviction rested upon illegally seized evidence. As a result, the instant case presents extraordinary circumstances within the thesis of this Court as applied in Brooks v. State, supra. Without regard to time and objection, admission of the evidence produced through Police Chief Collins was such as to impair and abridge appellant's fundamental and constitutional rights with a resulting denial of due process of law. The philosophy of the Brooks case is reinforced by Brown v. Mississippi, 279 U. S. 278, where the Court reversed a conviction which was procured on the basis of an unconstitutionally coerced confession which constituted the sole evidence upon which that conviction had been predicated. The Court held that the conviction and sentence were void for want of essential elements of due process and that the proceeding thus vitiated could be challenged in any appropriate manner.

Convictions procured by the introduction of such illegally seized evidence obtained in violation of constitutional and fundamental rights must be set aside, particularly when that evidence constitutes the sole basis for the conviction obtained in the Court below. As was stated in Brooks v. State, supra, fundamental constitutional rights rise above the rules of procedure and cannot be waived by counsel for the defendant, particularly where conviction of defendant rests solely upon such an insubstantial basis. Appellant cannot be said to waive the one right which would precipitate his conviction.

In Goldsby v. Harpole, 263 F. 2d 71, where the defendant had been represented by outstanding attorneys who waived his right to trial by a jury from which Negroes had been systematically excluded, the Court stated that

"Even in handling civil litigation, there are limitations upon implied authority of an attorney to make decisions for his client." Although no objection was raised in the trial Court, the defendant could not be said to have waived such a fundamental right.

In Johnson v. Zerbst, 304 U. S. 458, the Court stated, "It has been pointed out that Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. A determination of whether there has been an intelligent waiver of the right to counsel must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

It is asserted that counsel for the appellant could not intelligently and knowingly waive the very right which would insure the conviction of their client. Moreover, it is submitted that such a fundamental right of the appellant could not be waived by counsel's misconception of the method to properly exclude incompetent evidence. A waiver must be a voluntary act and made with knowledge. 56 *Am Jur* 114, *Section* 14.

It is conceded that the appellant has the right to waive such rights as are personal to him, such as the right to appear in person and with counsel; to demand the nature and cause of the accusation against him; to meet witnesses face to face; to procure the attendance of witnesses on his behalf, etc. However, those rights in which the State has an interest cannot be waived by the defendant. Only the State has the right to deprive the defendant of his life or liberty. The defendant himself does not have this

right and we submit that the defendant could not voluntarily waive a right, such as the one at issue here, when to do so could only result in his conviction. Justice Holmes in Schick v. U. S., 195 U. S. 65, 24 S. Ct. 826, 833, quoting Blackstone had this to say, "The natural life cannot legally be disposed of or destroyed by an individual, neither by the person himself nor by any other of his fellow creatures merely upon their own authority—The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by consent of the accused much less by his mere failure when on trial to object to unauthorized methods."

> "The life and liberty of the citizen is a matter of supreme importance to the State and it should not allow him to throw either away by a failure, intentional or otherwise, to take advantage of his constitutional safeguards." Norman v. State, 160 P 2d 739.

The appellant is somewhat shocked by the enthusiasm of the State to secure a conviction based on concedely incompetent evidence. The state produced its complaining witness who was extremely unsure of the facts and hazy about the identification of his alleged assailant.

In King v. State, 149 So. 2d 482, where appellant was convicted of interfering with an officer then attempting to make an arrest, the question of unreasonable search and seizure was raised for the first time on appeal. This Court considered the argument and held that the arrest of

the appellant was in violation of his right against unreasonable search and seizure as guaranteed by the Mississippi Constitution of 1890.

In the Brooks, Brown and King cases, the Court did not apply the rule of waiver because of the involvement of a fundamental right of the accused parties. Subversion of fundamental rights, because of superficial procedural requirements, cannot be allowed to determine this case. To hold otherwise would be to sacrifice substance to form.

As this learned Court pointed out, the State's case was based primarily upon the identity of the appellant. The testimony of the complaining witness was uncorroborated without the tainted evidence disclosed by the inspection of appellant's automobile. Admission of this illegally seized evidence was sufficient to impair the fair trial guaranteed the appellant by Article 3, Section 14, of the Mississippi Constitution of 1890.

The State has placed much stress upon those cases, collected in 74 ALR 2d 1384, beginning at page 1390, concerning writs of habeas corpus or coram nobis which raise the inadequacy of counsel as a denial of due process. A reading of those cases is persuasive that the activities of counsel were but one factor in the obtaining of a conviction. Conversely, in the instant case the success of the entire State's case depended upon the reception and consideration of illegally obtained evidence. The inadequacy of the State's case in no way parallel those cases cited in its brief.

In view of the foregoing, it is respectfully submitted that the State's Suggestion of Error should be overruled and that a mandate should issue from this Honorable

Court in accordance with its opinion rendered on June 3, 1963.

Respectfully submitted,

Jack H. Young
115½ N. Farish Street
Jackson, Mississippi

R. Jess Brown
125½ N. Farish Street
Jackson, Mississippi

Robert L. Carter
Barbara A. Morris
20 West 40th Street
New York 18, New York
Attorney for Appellant

By /S/ Jack H. Young
Of Counsel

CERTIFICATE

I, the undersigned Jack H. Young, attorney of record for the appellant, do hereby certify that I have this day personally delivered a copy of the above and foregoing REPLY TO STATE'S SUGGESTION OF ERROR to Hon. G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi.

Witness my signature on this 5th day of July, 1963.

/S/ Jack H. Young

APPENDIX 6

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42,652

AARON HENRY ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

REPLY TO ANSWER TO SUGGESTION OF ERROR

JOE T. PATTERSON, Attorney General
BY G. Garland Lyell, Jr.
Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARCH, 1963 TERM

No. 42,652

AARON HENRY ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

REPLY TO ANSWER TO SUGGESTION OF ERROR

In his reply to the suggestion of error filed herein, appellant has not answered the argument or the authorities set out in the suggestion of error. Even if the testimony of Police Chief Ben Collins was the only testimony as to the identity of appellant, that fact would not be decisive of this case. Contrary to the argument of appellant, he was identified by the prosecuting witness, Eilert, and Eilert's testimony was corroborated with respect to the inoperable cigarette lighter by one of appellant's own witnesses, a mechanic, who testified that shortly after March 3, 1962, appellant brought the cigarette lighter in to have it fixed.

King vs. State,——Miss.——, 149 So. 2d 482, is not authority for first raising the question involved here in this Court, since in the King case, "The Circuit Court being of the opinion that a constitutional question had been raised, by order entered allowed an appeal to this Court."

It is also interesting to note that none of the counsel for appellant responded to this writer's invitation in

the suggestion of error to file an affidavit that either of them did not know that a seasonable objection must be made to this or any other inadmissible testimony.

Respectfully submitted,

JOE T. PATTERSON, Attorney General

By

Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Reply To Answer To Suggestion Of Error to Messrs. Jack H. Young, 115½ N. Farish St., Jackson, Mississippi; R. Jess Brown, 125½ N. Farish St., Jackson, Mississippi and Robert L. Carter, 20 West 40th Street, New York 18, New York.

This the 8th day of July, A. D., 1963.

Assistant Attorney General

APPENDIX 7

HOKE STONE
Attorney At Law
Lambert, Miss.

October 18, 1963

Hon. Garland Lyle
Assistant Attorney General
State of Mississippi
Jackson, Mississippi

Dear Garland:

Please permit me to direct your attention to the last paragraph on page 20 of Aaron Henry's Petition for Writ of Certiorari in which I am misquoted and the facts are, as usual, distorted.

Henry's home was set afire by the use of two Molotov cocktails being thrown through his window. Confessions were obtained by officers from Theodore Carr and Aubrey Cauthen, Carr being the principal participant.

However, in the course of the trial of Carr, on preliminary hearing of the confession issue, the Court properly ruled that these confessions were not free and voluntary in that Police Chief Ben Collins and other officers had informed Carr before he made the confession that if he did not confess and permit them to break the case that day, the matter would be turned over to the FBI as agents were already in town and Carr was also assured that a bond in the amount of approximately $2,000 would be set. Therefore, to say that there was a confession from Carr would be technically erroneous.

I tried the case with advocacy but to my disappointment, Carr was acquitted by the jury. The other boy had only "been along", was a very weak person and was drunk and I saw no point in pursuing his case after the principal offender had been acquitted. Therefore, the nolle prosequi was recommended.

From this point on in the subject paragraph, all is in error. I never made such a statement and Babe Pearson did not make such an attempt.

If anything else in this vein will be helpful to you, let me know; and if I can help you in any other way in this matter, please call on me.

very truly yours,

HOKE STONE
Hoke Stone
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